
(2010) 04 GAU CK 0034
In the Gauhati High Court
Case No : Criminal Appeal No. 84 of 2005

Sri Hirendra Tripura and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 22-04-2010

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 164, 311, 313
Evidence Act, 1872 — Section 24, 3
Penal Code, 1860 (IPC) — Section 148, 149, 201, 302, 34

Citation : (2010) 2 GLD 595

Hon'ble Judges : I.A. Ansari, J;C.R. Sharma, J

Bench : Division Bench

Advocate : S. Sarkar and N. Mukherjee, for the Appellant; D. Sarkar, Public Prosecutor and R.C. Debnath, for the Respondent

Final Decision : Allowed

Judgement

I.A. Ansari, J.—By judgment and order, dated 14.9.2005, passed, in Sessions Case No. ST 14(ST/B) 2005, by the learned Additional Sessions Judge, Belonia, South Tripura, while three of the four accused-appellants namely, 1. Hirendra Tripura, 2. Naradhan Tripura, and 3. Gaticharan Tripura, stand convicted u/s 302 read with Section 34, IPC, the accused-appellant, Hirendra Tripura, stands convicted u/s 201, IPC too. For their conviction u/s 302 read with Section 34, IPC, while all the said three accused-appellant stand sentenced to suffer imprisonment for life and pay fine of Rs. 5,000/- each and, in default of payment of fine, suffer simple imprisonment for a period of one year, accused-appellant/Hirendra Tripura, stands, for his conviction u/s 201, IPC too, sentenced to suffer imprisonment for three years. As far as the fourth accused-appellant, namely, Ashidhan Tripura, is concerned, he stands convicted u/s 201, IPC only and sentenced accordingly to suffer simple imprisonment for a period of four years and pay fine of Rs. 5,000/- and, in default of payment of fine, suffer one year simple imprisonment, all the sentences having been directed to run against the

accused-appellants concurrently.

2. The materials facts, as unfolded at the trial, may, in brief, be set out thus:

On 28.3.2001, a 70 year old man, namely, Barada Sen Tripura, lost his way, because of his old age and reached Lengtabari from Shakbari. As Barada Sen Tripura did not return home, his family members, including his son, Balaram Tripura, got worried and started looking for him. On being unable to trace out his father's whereabouts, Balaram (PW 1) informed, on 31.3.2001, Hrishyamukh Police outpost that his father had been untraceable since 28.3.2001. Further search conducted, in this regard, by the said Barada Sen's son, Balaram (PW 1), and some others, revealed that an old man, resembling the father of Balaram (PW 1), had been seen, on 28.3.2001, in Jiban Bhowmik's tea stall and, from the tea stall of the said Jiban Bhowmik, his father had been taken to the house of Tusta Kumar Tripura (PW 7). On coming to know that his father had been taken by PW 7 to his house on 28.3.2001, PW 1, accompanied by some others, went to the house of PW 7 and made inquiry about his father, Barada Sen. Responding to the query, so made by PW 1, PW 7 told him that an old man had, indeed, come to his house and the old man had his dinner with him (PW 7), but, thereafter, Hirendra Tripura {i.e., appellant No. 1) and Ashidhan Tripura {i.e., appellant No. 4) took the said old man to some unknown place. On the following day, PW 1 and his companions could detect and find out Hirendra Tripura and Ashidhan Tripura and interrogated them but they did not disclose anything. Suspecting, however, that these two persons were behind the disappearance of his father, PW 1 and his companions took Hirendra and Ashidhan to Kalachhara and, on "prolonged interrogation", the said two persons disclosed that they, along with Nabin Kumar Tripura, Ranai Tripura, Bimal Tripura, Chedan Tripura, Manik Tripura, Rajumohan Tripura, Annadhan Tripura of the village, and Kalikumar Tripura of village Kailashnagar, had, suspecting the said old man to be a child lifter, taken him (the old man) to Kailashnagar Primary School, assaulted him throughout the night, the old man's knees were broken, the old man was, then, taken to jungle, a deep ditch was dug there and, thereafter, Nabin Tripura shot the old man dead and they buried the old man in the said ditch. PW 1, along with his companions, took the said two accused persons, namely, Hirendra and Ashidhan, to Manu Police Station and from there to Hrishyamukh Police Outpost and, concerning his father's disappearance and what he and others had been able to uncover with regard to the circumstances leading to his father being killed, PW 1 lodged, at the said Police Outpost, a written information (Exhibit P-I). Treating the said information as first information report, a case came to be registered. During the course of investigation, both the accused, namely, Hirendra and Ashidhan, were interrogated and they told the Investigating Officer that they would show the place, where they had buried the dead body of Barada Sen Tripura. The Investigating Officer (PW 10), accompanied by Executive Magistrate (PW 5), PW 1 and Ors. went to the jungle. On reaching the jungle, the two accused aforementioned showed the police a place and, with the help of labourers, the said place was dug and the dead body of Barada Sen Tripura was recovered. The

Executive Magistrate, who had accompanied the Investigating Officer, held inquest over the said dead body and prepared inquest report. During the course of investigation, post-mortem examination was conducted over the said dead body and, on completion of investigation, police laid charge-sheet against 12 (twelve) accused persons, including the present accused-appellants, under Sections 302/201/34, IPC read with Section 27 of the Arms Act.

3. During trial, charges u/s 148 and also under Sections 302 and 201, read with Section 149 of the IPC, were framed against all the said twelve accused persons. A charge u/s 27 of the Arms Act was also framed against all the said accused persons. To the charges, so framed, all the accused persons aforementioned pleaded not guilty.

4. In support of their case, prosecution examined as many as 12 witnesses. Accused Khungtai Tripura, however, died after the trial had commenced. The remaining accused persons were, then, examined u/s 313, Code of Criminal Procedure and, in their examination, aforementioned, they denied that they had committed the offence(s) alleged to have been committed by them, the case of the defence being that of total denial. No evidence was, however, adduced by the defence.

5. The learned trial Court, having held the present four accused-appellants guilty of the offence(s) as indicated above, convicted them accordingly, and passed sentences against them as mentioned above. The remaining accused persons were acquitted of the charges framed against them. Aggrieved by their conviction and the sentences, passed against them, the four convicted persons have preferred this appeal.

6. We have Mr. S. Sarkar, learned Counsel for the accused-appellants and Mr. D. Sarkar, learned Public Prosecutor, appearing on behalf of the respondents.

7. Let us, now, discuss, in a nutshell, the evidence of prosecution witnesses.

8. According to the evidence of PW 1 (Balaram Tripura), his father went to his relative's house on 27.3.2001 and was supposed to come back on 28.3.2001, but his father did not return home and he (PW 1) came to know that his father had gone to Lengtabari to visit the house of his relative. PW 1 has also deposed that in the afternoon, on 28.3.2001, on returning from school, he came to know, from the local people, that his father had lost his way and went to Bhuratali area, whereupon he, along with his brother, went to the said, area, but could not find his father there. PW 1 has further deposed that, on the next day (i.e., on 29.3.2001), he, along with others, went to Lengtabari, where they happened to meet one Jiban Bhowmik, who told them that one old man had been to his shop, but he was taken to the house of Tusta Kumar Tripura (PW 7). PW 1 has deposed that on receiving this information, they all went to the house of PW 7 and asked him about the said old man.

9. It is in the evidence of PW 1 that PW 7 told them that PW 1's father did come

to his (PW 7's) house, he fed the old man and, thereafter, Hirendra Tripura and Ashidhan Tripura (i.e., accused-appellant Nos. 1 and 4 respectively) took PW I's father towards some unknown place, whereupon PW 1 and his companions searched for accused Hirendra Tripura and Ashidhan Tripura. It is also in the evidence of PW 1 that on the following day, i.e., on 30.3.2001, they could find accused, Hirendra Tripura And Ashidhan Tripura, and the said two accused were asked about the whereabouts of the old man, but the two accused refused to say anything. PW 1 has deposed that suspecting Hirendra and Ashidhan to be involved in the disappearance of his father, Barada Sen Tripura, they brought accused Hirendra and Ashidhan to the house of PW 1, at Kalachhara, where the said two accused, on "prolonged interrogation", told PW 1 and others that they, along with others, had caught PW I's father suspecting him to be a child-lifter, they took him to Kailashnagar Primary School, where accused Hirendra, Ashidhan, Nabin, Nabin, Manik Tripura, Sadhan Tripura, Annadhan Tripura, Bimal Tripura and others assaulted him throughout the night and, thereafter, both the knees of PW I's father were broken, he was taken inside the jungle, where a big ditch was dug, PW I's father was thrown into the ditch, while he was still alive, and accused Nabin Tripura fired from gun on PW I's father is chest and head and PW I's father died and was buried there.

10. PW 1 goes on to state, in his evidence, that after getting the information as to how his father had been done to death, he informed Hrisyamukh police outpost about the incident by submitting a written information, which had been written by Sanjib Dey (PW 12). PW 1 has proved Exhibit P-I as the said written information.

11. PW 1 also goes on to state that on 31.3.2001, they (PW 1 and his companions), accused Asijoy and Hirendra, along with police, went to the jungle, they found the place, where his father was buried, and, with the help of police, the dead body of his father was recovered, photographs of the dead body were taken and inquest report was signed by him, Exhibit 2 being the inquest report.

12. During his cross-examination, PW 1 has deposed that both Hirendra and Ashidhan had told them, about the place, where his father as buried. Except putting some suggestions to PW 1, nothing was elicited from the evidence of PW 1 to show that what he had deposed was untrue or false.

13. Be that as it may, what is most important to note is that PW 1 asserted, during his cross-examination, that they did not assault accused Hirendra and Ashidhan.

14. Broadly in tune with the evidence of PW 1, PW 2 (Sen Chandra Tripura) has deposed that on 27.3.2001, his maternal uncle, namely, Barada Sen Tripura, had gone out and, thereafter, his whereabouts were not known and a search for his uncle began. PW 2 has also deposed that during the course of the search, they went to Lengtabari and came to know, from Jiban Bhowmik, that he (Jiban Bhowmik) had seen an old man, who was taken by Tusta Kumar Tripura (PW 7)

to his house. PW 2 has further deposed that PW 7 told them that he had, indeed, taken the old man to his house, but, thereafter, Hirendra and Ashidhan had taken his (PW 2) maternal uncle away with the allegation that the old man was a child-lifter. PW 2 has deposed that they caught hold of Hirendra Tripura and Ashidhan Tripura and the said two accused persons confessed that they had beaten PW 2's maternal uncle and that one Nabin Tripura had shot PW 2's maternal uncle dead by a country-made gun. PW 2 has further deposed that they produced both the said accused, namely, Hirendra Tripura and Ashidhan Tripura, before the police, they were taken to Hrishyamukh police outpost and, on the following day, they, accompanied by other policemen and the two accused persons, went to the jungle and recovered the dead body of his maternal uncle, Barada Sen Tripura. PW 2 has proved Exhibit 2 as the inquest report.

15. In the cross-examination of PW 2, nothing was elicited by the defence except putting some suggestions to PW 2, but the suggestions, so offered were denied by PW 2.

16. Coming to the evidence of PW 3 (Manindra Tripura), who is a nephew of the said Barada Sen Tripura, we notice that his evidence too is broadly in tune with the evidence of PW 1 and PW 2 inasmuch as PW 3 deposed that his maternal uncle, Barada Sen Tripura, had gone missing since 28.3.2001, they went in search of his uncle, to Lengtabari, where they visited the tea-stall of Jiban Bhowmik, who told them that Tusta Kumar had taken PW 3's uncle to his (Tusta Kumar's) house and that accused Hirendra and Ashidhan had taken PW 3's uncle from there. PW 3 has also deposed that accused Hirendra and Ashidhan confessed that they had taken PW 3's uncle to a school and assaulted him there and Nabin shot him by a country-made gun, they took the dead body to the jungle of Lengtabari and buried the dead body there. It is in the evidence of PW 3 that after the confession was made by the two accused persons aforementioned, PW 3 and others took the said two accused persons to police outpost and, thereafter, they were taken to Lengtabari Jungle and, on being led by the said two accused persons, they went to the place, where the dead body was buried and the police recovered the dead body.

17. Not only PW 1, but PW 2 and PW 3 too have denied that the two accused, namely, Hirendra and Ashidhan, had been beaten during the course of their interrogation. What is, however, important to note, in the evidence of PW 3, is that according to him (PW 3), both the said accused persons, namely, Hirendra and Ashidhan, had confessed to have killed Barada Sen Tripura and buried in the Jungle and that both the said accused persons led the police to the place, where the dead body laid buried. PW 3 could not, when asked, say as to who, between the said two accused persons, namely, Hirendra and Ashidhan, had gone forward to the spot. That is to say, PW 1 could not say as to who, between the said two accused, was the one, who had first shown the place from where the dead body was recovered. This apart, while PW 1 claims that accused Hirendra and Ashidhan, on being questioned, at Lengtabari, refused to say anything,

whereupon they were brought to PW 1's house and, on prolonged interrogation, they told PW 1 and PW 2 as to how PW 1's father had come to be killed by them, PW 2 has not mentioned as to when and where exactly the said two accused had confessed to have been involved in the killing of PW 1's father. Even PW 3's evidence, like the evidence of PW 2, does not clearly state as to where and where the said two accused had confessed to have killed PW 3's uncle, Barada Sen Tripura.

18. Turing to the evidence of PW 4 (Jadu Biswas), we notice that he is the person, who went to Jungle of Lengtabari with the Investigating officer and others and took photographs of the said dead body.

19. Coming to the evidence of PW 5 (Tarun Debnath), we find that PW 5 is the Executive Magistrate in whose presence, the dead body of Barada Tripura was, admittedly, recovered. This witness's evidence is that on 31.3.2001, he was posted as Sub-Deputy Collector at Belonia Sub-Division and, on that day, on the direction of the Sub-Divisional Magistrate, he, accompanied by SDPO, other police personnel, the two accused persons and other relatives of the deceased, went to the north-eastern side of the Jungle of Nalua, in the Lengtabari area, to search the deadbody. Without disclosing the names of the two accused, PW 5 has deposed, as recorded by the learned trial Court, that the two accused showed the burial spot, where the dead body was lying buried. PW 5 has further deposed that at the time of pulling out the dead body, photographs were taken and, when the dead body was taken out, he noticed that the deceased was wearing gamocha (i.e., a country made towel), it has injury on the left side of the head and its both hands stood tied by rope. It is in the evidence of PW 5 that he prepared inquest report in the presence of witnesses, the inquest report being Exhibit 3. PW 5 has claimed that the two accused told him that they, along with others, had killed and buried the deceased.

20. In his cross-examination, PW 5 has denied that the relatives of the deceased were already present at the place of recovery of the dead body, though he admits that the relatives of the deceased were present at the time, when the recovery was made. Except putting suggestions to PW 5, nothing else was elicited from his cross-examination.

21. As far as PW 6 (Santosh Debnath), who is a daily labourer, is concerned, is evidence is that the police called him to go to Lengtabari for recovering a dead body, whereupon, he, accompanied by police, the two accused persons, and some others went to the said area, the accused persons showed them the path leading to the spot, where the dead body was lying buried, and, thereafter, the two accused led them to the burial spot and showed the place to the police. PW 6 also deposed that he asked the two accused to remove the soil over the burial spot and, accordingly, they dug some soil from the burial spot and, thereafter, he (PW 6) dug out the dead body, which was dead body of a tribal person, and they carried the dead body, on their shoulder, with the help of the two accused persons.

22. What is, however, extremely important to note, in the evidence of PW 5, is that according to him, before they arrived at the spot, where the dead body was found, some other tribal men had already arrived there and were keeping a watch over the said burial spot. This shows, we may promptly point out, that the place of recovery had already stood identified and, that is why, some tribal men were already present and keeping watch over the said burial spot, when the two accused-appellants aforementioned, accompanied by the police and the Executive Magistrate, arrived there.

23. Turing to the evidence of PW 7 (Tusta Kumar Tripura), who was the one at whose house, the said deceased is claimed to have had his dinner, we find that according to his evidence, in the month of March, 2001, he, along with his sister, went to the house of Dr. Santosh Chakraborty, at about 2-00 p.m. for, treatment, and, at about 4-00 p.m. on that day, while he was returning home, Jiban Banik, owner of a tea stall, called him and told him that one tribal man was sitting there, whereupon PW 7 went to the old and asked him as to where his house was. According to the evidence of PW 7, the said old man told once that his house was at Shakbari and, thereafter, he told that his house was at Kalachara. PW 7 has deposed that he considered the old man to have been suffering from mental disease. It is in the evidence of PW 7 that he, then, started for his house, the old man followed him to his house and, on being asked, the old man told him that he was hungry, whereupon he (PW 7) provided the old man with meal.

24. The crucial part of the evidence of PW 7 is that, in the evening, four youths, namely, Hirendra Tripura, Khungtai Tripura, Naradhan Tripura, and Gaticharan Tripura, appeared at his house. PW 7 has also clarified that all the said four youths were known to him as neighbours and they told him (PW 7) that one child-lifter was staying at his house and, thereafter, they caught hold of the said old man and took him away.

25. PW 7 has further deposed that on the next day morning, he informed the police about the occurrence and, thereafter, he saw Hirendra and Ashidhan at the Hrishyamukh Police Outpost.

26. It is also in the evidence of PW 7 that Sub-Inspector Ratan Banik and other police personnel took him along with accused Hirendra and Ashidhan to jungle, police personnel and the two accused persons searched the jungle and, after some time, Hirendra and Ashidhan came with the dead body of the old man, but, thereafter, Balaram Tripura assaulted him (PW 7) and threatened to kill him on false allegation that he (PW 7) had not given shelter to Balaram's father, i.e., the said deceased. It is also in the evidence of PW 7 that the police forwarded him to the Court for giving his statement and his statement was accordingly recorded.

27. What is, now, important to note is that during the course of his cross-examination, PW 7 has deposed that accused Hirendra and Ashidhan were beaten by Balaram, the police also beat the two accused persons and that the accused persons were forced to admit their guilt. It is in the evidence of PW 7

that the two accused persons were brought to Hrishyamukh Police Outpost and at that time, they were injured. It is also in the evidence of PW 7 that the two accused persons were, then, taken to hospital and there also, the two accused persons were beaten. PW 7 has deposed that the two accused persons confessed their guilt to Balaram and he (PW 7) has not heard the said two accused confessing their guilt to anybody else. PW 7 has further deposed that he did not go to the place from where the dead body was recovered meaning thereby that he went only up to the jungle and he did not know the exact place, where the dead body lied buried.

28. Coming to the evidence of the Investigating Officer (PW 10), we note that his evidence is that on 31.3.2001, while he was functioning as the Officer-in-charge of Hrishyamukh Police Outpost, he received a written Ejahar from one Balaram Tripura (PW 1) and, on making General Diary Entry, he sent the said Ejahar for registration and started investigation.

29. PW 10 has deposed that he requested the SDM to depute one Magistrate for recovery of the dead body of Barada Sen Tripura, whereupon Tarani Debbarma (PW 5), an Executive Magistrate, was deputed and, on that day, the Officer-in-Charge, Manubazar Police Station, forwarded the two accused, namely, Hirendra Tripura and Ashidhan Tripura, to him. PW 10 has also deposed that during investigation, the said two accused persons confessed their guilty and they also told him (PW 10) that they would show the place, where the dead body was buried by them, and, accordingly, he (PW 10), along with his staff, Executive Magistrate, the accused persons and the complainant (i.e., informant) went to jungle for recovery of the dead body.

30. PW 10 has further deposed that in the jungle, as per indication given by the two accused persons, the burial place was detected and, with the help of the labourer, the dead body was recovered, whereupon the executive Magistrate prepared inquest report.

31. During his cross-examination, PW 10 has deposed that he did not receive any information about any assault on the two accused persons, namely, Hirendra Tripura and Ashidhan Tripura.

32. When we turn to the evidence of PW 11 (Narasingha Das), who was the SDM, Belonia, at the relevant point of time, and who is said to have recorded the confessional statement of the four accused persons, namely, Hirendra Tripura, Ashidhan Tripura, Kalikumar Tripura and Manik Tripura, we notice that according to the evidence of this witness, on 2.4.2001, one Tusta Tripura (PW 7) was forwarded to him for recording statement u/s 164, Code of Criminal Procedure and he, accordingly, recorded the statement of the said person. PW 11 has proved the said statement of Tusta Kumar Tripura (PW 7) as Exhibit P-4.

33. PW 11 has also deposed that, on 3.4.2001, accused Hirendra Tripura, Ashidhan Tripura, Kalikumar Tripura, and Manik Tripura were forwarded to him in connection with recording of confessional statement and as the accused persons

had expressed their intention to make confessional statements, he recorded their confessional statements observing all the formalities and, thereafter, the accused persons put their signatures on their respective confessional statements.

34. In his cross-examination, PW 11 has admitted that he did not enquire from the said accused persons as to why they had volunteered to make confessional statements. PW 11 has also admitted that the accused-persons did not give any reason for making confessional statements. It is, however, in the evidence of PW 11 that he had told the accused persons that they would not be remanded to police custody if they did not make any statement. PW 11 has, however, admitted that he did not record the fact that he had assured the accused persons that they would not be remanded to police custody even if they chose not to make confessional statement. PW 11 also admits that he did not ask the accused persons if they had been tortured in connection with the case during the time of their detention in police custody. PW 11 admits that he has not recorded as to how much time was given to the accused persons for making reflection on their confession, which the accused persons were willing to make. Their confessional statements are proved as Exhibit 8 series.

35. As far as PW 12, namely, Sanjib Dey, is concerned, he has merely deposed that Balaram Tripura (PW 1) was his neighbour and, on 30.3.2001, at about 10.00 a.m., he had written the Ejahar.

36. On a combined reading of the evidence, given by the prosecution witnesses, particularly, PW 1, PW 2 and PW 3, what transpires is that Barada Sen Tripura went to his relative's house on 27.3.2010 and, though he was supposed to come back on 28.3.2010, he did not return home. This made his son (PW 1) and his other family members worried. Though a search was made by Barada's son (PW 1) to trace out the whereabouts Of his father, his father could not be traced out. However, on 29.3.2010, on the basis of some information received, PW 1, accompanied by some others, went to Lengtabari, where they happened to meet one, Jibon Bhowmik, who told them that one old man had been to his shop and the old man was taken to the house of PW 7. On receiving this information, PW 1 and his companions went to the house of PW 7 and asked him (PW 7) about the whereabouts of the said old man, whereupon PW 7 told (according to what PW 1 has deposed) that an old man had, indeed, come to his house, PW 7 had fed the old man, but, thereafter, Hirendra. Tripura and Ashidhan Tripura (i.e., accused-appellant No. 1 and 4 respectively) took the old man to some unknown place. On the basis of the information, so received from PW 7, though PW 1 and his cousin, PW 2, searched for Hirendra and Ashidhan, they did not find any of the two accused on 29.3.2010.

37. Pausing here for a moment, when we turn to the evidence of PW 7, we notice that according to the evidence of PW 7, who was the one at whose house, the said deceased is claimed to have his dinner, he, along with his sister, went, in the month of March, 2001, to the house of Dr. Santosh Chakraborty, at about 2-00 p.m., for treatment, and/at about 4.00 p.m., on that day, while he was returning

home, Jiban Banik, owner of a tea-stall, called him and told him that one tribal man was sitting there, whereupon PW 7 went to the old man and asked him as to where his house was. According to the evidence of PW 7, the said old man told once that his house was at Shakbari and, thereafter, he told that his house was at Kalachara. PW 7 has deposed that he considered the old man to have been suffering from mental disease. It is in the evidence of PW 7 that he, then, started for his house, the old man followed him to his house and, on being asked, the old man told him that he was hungry, whereupon he (PW 7) provided the old man with meal.

38. Before proceeding further, let us take notice of some of the glaringly noticeable aspects of the evidence of PW 7 vis-a-vis the evidence of PWs 1, 2 and 3. Accordingly to PW 7, in the evening of 28.3.2001, four youths namely, Hirendra Tripura, Khungtai Tripura, Naradhan Tripura and Gaticharan Tripura, appeared at his house. PW 7 has also clarified that all the said four youths were known to him as neighbours and they told him (PW 7) that one child-lifter was staying at his house and, thereafter, they caught hold of the said old man and took him away. When, however, the evidence of PW 7 is considered in the light of the evidence of PW 1, PW 2 and their cousin, PW 3, what becomes clear is that PW 7 gives names of as many as four persons, who had taken away the said old man, the names being Hirendra Tripura, Khungtai Tripura, Naradhan Tripura and Gaticharan Tripura. As against the four names, which PW 7 has given as the names of the persons, who had come to his house and taken away the said old man by suspecting him to be a child-lifter, PW 1, PW 2 and PW 3 have claimed that PW 7 had given to them the names of two persons, namely, Hirendra Tripura and Ashidhan Tripura as the persons, who had taken away the said old man from the house of PW 7. This apart, while PW 1, PW 2 and PW 3 have claimed that PW 7 had named not only Hirendra Tripura, but also Ashidhan Tripura as the two persons, who had gone to the house of PW 7, it is curious to note that PW 7, on the other hand, does not name accused Ashidhan Tripura (i.e., accused-appellant No. 4 herein) at all as one of the four youths, who had gone to the house of PW 7 and taken away the said old man; rather, the names, which PW 7 mentions are Hirendra Tripura, Khungtai Tripura, Naradhan Tripura and Gaticharan Tripura.

39. Thus, the evidence of PW 7, from whose house the old man was taken away by four youths suspecting the old man to be a child-lifter and whose dead-body is claimed to have been, eventually, found in the jungle of Lengtabari, does not implicate at all accused-appellant No. 4, Ashidhan Tripura. Consequently, in order to sustain the conviction of the accused-appellant No. 4, Ashidhan Tripura, the evidence of PW 7 is of no help to the prosecution.

40. We have to, therefore, carefully scan the entire evidence on record to determine if there is any other reliable and trustworthy evidence to sustain the conviction of the accused-appellant No. 4, Ashidhan Tripura. This apart, even as against the remaining appellants, the evidence of PW 7 cannot be implicitly relied upon inasmuch as the evidence of PWs 1, 2 and 3 does not support the assertion

of PW 7 that he had disclosed to PW 1, when the later made enquiry as regards the disappearance of his (PW I's) father, Barada Sen Tripura, the names of all the four persons, who had (according to PW 7) come to his house. When it is not possible to confidently hold as to what PW 7 had actually told PWs 1, 2 and 3, neither the evidence of PW 7 can be relied upon nor can the evidence of PWs 1, 2 and 3 be depended upon for the purpose of holding that any of the accused-appellants, including Ashidhan Tripura, had gone to the house of PW 7 and taken away the said old man suspecting him to be a child-lifter.

41. Situated thus, it becomes clear that, depending upon evidence of PW 7, it cannot be confidently held that the accused-appellants, Hirendra and Ashidhan, had come to his house and taken away the old man, whom PW 7 claims to have given meal. Similarly, and at the same time, the evidence of PWs 1, 2 and 3 too cannot be made basis for holding that accused-appellants, Hirendra and Ashidhan, had come to the house of PW 7 and taken way the said old man, particularly, when PW 7 does not even claim that he had, in this regard, disclosed to PWs 1, 2 and 3 the name of accused-appellant, Ashidhan Tripura.

42. With regard to the above, it is also extremely important to note that PWs 1, 2 and 3 do not know as to whether the two appellants, Hirendra and Ashidhan, had really gone to the house of PW 7 and/or taken away with them Barada Sen Tripura or not. For this purpose, PWs, 1, 2 and 3 relied upon what PW 7, according to the evidence of PWs 1, 2 and 3, had told them; but when PW 7 himself does not disclose the name of the accused-appellant, Ashidhan, the evidence of PWs 1, 2 and 3 cannot be made basis for holding that Ashidhan had gone to the house of PW 7 either alone or with someone else and taken away the said old man. At any rate, in the light of the evidence discussed, it is more than abundantly clear that neither the evidence of PW 7 nor the evidence of PWs 1, 2 and 3 can be made basis for holding that the evidence-appellants, Ashidhan Tripura, had gone to the house of PW 7 and taken away the said old man nor can the evidence of PWs 1, 2 and 3 or the evidence of PW 7 be confidently made basis for holding that the remaining three accused-appellants, namely, Hirendra, Khungtai and Gaticharan, had visited the house of PW 7 and taken away with them the old man , whom PW 7 claimed to have given meal.

43. It is worth noticing that the prosecution, in the present case, has led, on the above aspect of the case, two distinctly different sets of evidence. While the one set of evidence shows that the appellants Hirendra and Ashidhan, were the ones, whose names had been disclosed to PWs 1, 2 and 3 by PW 7, the evidence of PW 7 shows that he did not tell them (PWs 1, 2 and 3) at the name of the accused-appellant No. 4, Ashidhan Tripura; rather, he (PW 7) claims to have given to PWs 1, 2 and 3 the names of Hirendra, Naradhan, Khungtai and Gaticharan as the four youths, who had come to his house and taken away the said old man suspecting him to be a child-lifter. Relying, therefore, on the evidence of either PW 7 only or on the evidence of PWs 1, 2 and 3 collectively, it cannot be confidently held that all the four appellants or three of them, namely, Hirendra,

Khungtai and Gaticharan, were the one who had taken away the said old man from the house of PW 7 even if we believe the evidence of PW 7 that the old man, who had dinner in his house, had been taken away by four youths. Identity of the said four youths having not been clearly, explicitly, precisely, convincingly and beyond reasonable doubt having been determined, it is well-nigh impossible and too hazardous to hold that the appellants were the ones, who had brought the said old man from the house of PW 7.

44. Yet another important aspect of the case is that the prosecution did not examine, at the trial, the doctor, who had conducted post-mortem examination on the dead-body, which had been recovered allegedly on the basis of the statements made by the two accused-appellants, Hirendra and Ashidhan, to the police. The learned trial Court also did not take care to examine the doctor/ though the learned trial Court did have such a power u/s 311, Code of Criminal Procedure.

45. On noticing however, during the course of hearing of this appeal, that the doctor's evidence would be material for determining the cause of death of the person, whose dead-body was recovered as claimed, we examined the doctor as a Court witness. The doctor has given evidence to the effect that he had found an oval shaped wound about 5 cm. above the right ear, the diameter being 1-1/2 inches, a portion of parietal bone was detached from the rest of cranium on the left side, the diameter being 3 inches. It is also in the evidence of the doctor that the whole membranes and brain matters were powdery, foul smelling and no anatomical structure could be identified. The doctor has further deposed that the 5th and 7th ribs were found broken on the left side near the angles and pleural space, on left side, was filled with blood. The doctor has opined that death was due to combined effect of gunshot injuries leading to intracerebral haemorrhage and external injuries leading to fracture of ribs and hemothorax on left side. There is no dispute, in the present case, as indicated by the medical evidence on record, that the death of the person, whose dead-body had been recovered, was homicidal in nature and caused by gunshot injuries as mentioned hereinbefore.

46. What is, now of utmost importance to note is that the medical evidence on record shows that the dead body, which had been recovered, was beyond identification. The prosecution has not given any evidence as to how the dead body, which was admittedly, recovered from the Jungle of Lengtabari, was identified to be the dead body of Barada Sen Tripura. The learned trial Court has also remained silent spectator, in this regard, and merely kept mechanically recording evidence without ascertaining or trying to ascertain, as to how, and on what basis, the said dead body was recognized to be the dead body of Barada Sen Tripura. We are not unmindful of the fact that PW 1, supported by the evidence PW 2 and PW 3, asserts that it was Barada's dead body, which was recovered from the said jungle. [See Ram Chandra and Another Vs. State of Uttar Pradesh, and Rama Nand and Others Vs. State of Himachal Pradesh,

47. However, the fact remains that the basis of this identification has not been

elicited from PW 1, PW 2 and/or PW 3. In such circumstances, merely because of the fact that PWs 1, 2 and 3 claimed that the said dead body was Barada Sen's dead-body, it cannot be held, and ought not to have been held, that the said dead-body was Barada Sen Tripura's dead body. We may hasten to point out that we must not be misunderstood to say that merely because of the fact that the basis for identification of the said dead-body, which was, otherwise, beyond recognition, has not been elicited from PWs, 1, 2 and 3, the said dead-body was not of Barada Sen Tripura's.

48. In view of the fact that PWs 1, 2 and 3 had identified the said dead body as Barada Sen Tripura's dead-body, though without disclosing the basis of such identification, prosecution can still be taken to have proved the said dead body to be Barada Sen's dead-body if the two accused-appellants, namely, Hirendra and Ashidhan, can confidently be held to have made "voluntarily and truthfully" judicial confessions as recorded by the Sub-Divisional Judicial Magistrate (PW 11) or the said two accused-appellants can be safely held to have "voluntarily and truthfully" made extrajudicial confessions owning up their guilt as reflected from the evidence of PWs 1, 2 and 3 provided that this Court can boldly hold depending on the evidence of PWs 1, 2, 3 and/or PW 6 (a labourer) and/or PW 5 (SDC) and/or PW 10 (Investigating Officer), that on the basis of the statements made by the said two appellants to the police and/or led by the said two accused-appellants, the police had come to the spot, where the said dead body was dugged out from.

49. Considering the fact that in the light of the evidence of PW 6, who is an independent witness, the place of recovery of the said dead body already stood identified, the evidence, adduced by the prosecution, attempting to indicate that the said dead-body was recovered in consequence of the statement, which the two accused-appellants aforementioned had made to the investigating officer, and also on being led by the two accused-appellants, aforementioned, pale into insignificance. In such circumstances, it is impossible to hold with confidence that the said dead-body was the dead body of Barodasen Tripura.

50. We may pause here to make it clear that it is trite that in law, conviction for an offence does not inherently depend upon corpus delicti being found. There may be reliable evidence, direct or circumstantial, of commission of murder, though corpus delicti remains untraceable. [See Ram Chandra and Another Vs. State of Uttar Pradesh,

51. It is true that the one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused "caused the death" of the person alleged to have been killed. This means that before seeking to prove that the accused is the one, who had caused the death, it must be established that homicidal death has been caused. Ordinarily, the recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. There was a time, when under the old English law, the finding of the body of the deceased was held to be

essential before a person was convicted of committing culpable homicide. "I would never convict," said Sir Mathew Hale, "a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead." This was merely a rule of caution, and not of law. But in those times, when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead body of the victim, bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature, where the discovery of the dead body is impossible. A blind adherence to this old "body" doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of any eye-witness, or by circumstantial evidence, or by both. But where the fact of corpus delicti i.e. "homicidal death" is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world and absolute certainly, is a myth. That is why u/s 3 of the Evidence Act, a "fact" is said to be "proved", if the Court, on the basis of the matters laid before it, considers the existence of the "fact" so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculcating circumstances, which definitely lead to the conclusion that within all human probability the victim has been murdered by the accused concerned. [See Rama Nand and Others Vs. State of Himachal Pradesh,

52. Turning to the case at hand, we may reiterate that when the dead body was beyond recognition and highly decomposed, prosecution ought to have brought on record the basis of identification of the said dead-body, as Barada Sen Tripura's dead-body, by PWs 1, 2 and 3 to show as to how they had come to know that the said dead-body was of Barada Sen Tripura. Situated thus, in the complete absence of any evidence showing as to how the said dead-body had come to be identified by PWs, 1, 2 and 3, the mere fact that PWs, 1, 2 and 3 claimed that the said dead-body was the dead-body of Barada Sen Tripura, it cannot be confidently held, and ought not to have been held by the learned trial Court, that the said dead-body was Barada's dead-body, particularly, when the evidence of PW 6, as already discussed above, clearly shows that the place of recovery of the said body already stood identified before the two accused-appellants, namely, Hirendra and Ashidhan, arrived there. The question as to whether the appellants had caused the death of Barada Sen Tripura and/or

caused disappearance of his dead body is, however, the question, which may be proved by the prosecution independent of the fact as to whether the said dead body was or was not the dead body of Barada Sen Tripura.

53. In short, thus, one of the circumstances, leading to the recovery of the said dead body, is that the said deceased had his meal, in the evening on 28.3.2001, at the house of PW 7, and, from there, the said deceased was, suspecting to be a child-lifter, taken away (according to evidence of PW 7) by many as four person, namely, Hirendra Tripura, Khungtai Tripura, Narad-han Tripura and Gaticharan Tripura. Among the persons, who, according to PW 7, had come to his house (PW 7), three persons, namely, Hirendra Tripura, Naradhan Tripura and Gaticharan Tripura are, now, appellants in the present appeal and, as far as Khungtai Tripura is concerned, he has not been convicted and is not an appellant in this appeal. As far as the appellant, Ashidhan Tripura, is concerned, we have already held that the evidence of PW 7 does not implicate him. The prosecution's case, therefore, comes to rest, as against the appellants, on the extra-judicial confessions, which two of the accused-appellants, Hirendra Tripura and Ashidhan Tripura, had allegedly, made to PWs 1, 2 and 3 and also on their judicial confessions recorded by PW 11.

54. Let us, now, turn to the extra-judicial confessions, which the accused-appellants, namely, Hirendra Tripura and Ashidhan Tripura (i.e., accused-appellant Nos. 1 and 4 respectively) had, in the light of the evidence of PWs 1, 2 and 3, allegedly made. It needs to be carefully noted that all these three witnesses, namely, PWs 1, 2 and 3, claim that accused Hirendra and Ashidhan had confessed that the old man (i.e. Barada Sen Tripura) had been taken away by them from the house of PW 7 to a local school and he was assaulted there.

55. What, now, attracts our attention is that, according to PW 1, the accused-appellants, Hirendra and Ashidhan, had told them that from the said school, Barada was taken inside the jungle, where a big ditch was dug, Barada was thrown into the ditch, while he was still alive, and, then, accused Nabin Tripura (who is not an appellant in the present appeal) fired from a gun on Barada's chest and head, Barada died, and he was buried there. As against the evidence, so given by PW 1, PW 3 claims that the said two appellants had told them that Barada, having brought to the said school, was assaulted, accused Nabin shot Barada dead by a country-made gun and it is then that the Barada's dead body was taken to the jungle and buried there; meaning thereby that when Barada was taken to the jungle, he was already dead.

56. Thus, there is contradiction inherent in the evidence given by PW 1 and PW 3, both of whom claim that the appellants, Hirendra and Ashidhan, had made confession inasmuch as PW 1 claims that the two appellants aforementioned confessed to the fact that his father, Barada Sen Tripura, was brought to the jungle, while he was still alive, and after throwing his father into the ditch, his father was shot dead; whereas PW 3 claims that his uncle, Barada Sen Tripura, was already dead, when he was brought to the jungle, because he had been

(according to the evidence of PW 3) killed in the local school itself.

57. While considering a confession, particularly, when the confession is extrajudicial in nature, it is imperative for the Court to elicit from the witnesses and determine, with as much clarity and precision as reasonable possible, as to what a person, accused of an offence, had actually stated, while making his extra-judicial confession or even judicial confession. In other words, a Court cannot consider the evidence of an extra-judicial, confession, against an accused, as safe, believable and/or reliable - far less base conviction of the accused on such evidence - without ascertaining if the accused had actually stated those facts, which the witness or witnesses claim to have been made by the accused.

58. In the present case, we find wholly impossible to ascertain, from the contradictory evidence of PW 1 and PW 3, as to whether Barada was alive or dead at the time, when he was brought to the jungle. This inconsistency destroys the value of the extra-judicial confession (which the said two appellants are claimed to have made), because a statement, in order to be treated as a confession, must be true. When there are two contradictory versions, one given by PW1 and the other by PW 3, as to when the where Barada was killed, and when the Court is unable to know as to where Barada was killed, the possibility, that the confession was not true, cannot be boldly ruled out. It is always for the prosecution to prove, and prove beyond all reasonable doubt, that the confession was not only voluntary, but true as well. A statement, made by an accused, which has streaks of falsehood or uncertainty, cannot be treated as a confession.

59. What follows from the above discussion is that the evidence of extra-judicial confession, which is brought on record with the help of the evidence of PWs 1, 2 and 3, cannot be safely relied upon and must, in one facts and attending circumstances of the present case, be kept eschewed from the purview of this Court's consideration. Having indicated that the extra-judicial confessions, which the prosecution has relied upon, were inherently inconsistent and contradictory and could not have, therefore, been safely relied upon, we may, now, come to another important aspect of the alleged extra-judicial confessions, namely, as to whether the said extra-judicial confessions can be safely relied upon as voluntary.

60. We may, at this stage, pause here to refer to Section 24 of the Evidence Act, which reads as under:

24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.-A confession made by an accused person is irrelevant in criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

61. The expression, appears to the Court, occurring in Section 24 shows something less than positive proof in the nature of well-grounded probability, though not mere possibility, that the confession is not voluntary. The word "appears", occurring in Section 24, indicates lesser degree of probability than the word "proof as defined in Section 3 of the Evidence Act. In other words, Section 24 does not require that the accused must prove that he made confession under inducement, threat or promise. If there are circumstances from which it appears that a confession was not made voluntarily, the Court would be wholly justified in rejecting such confession even though there is no such material on record, which might amount to the proof of confession having been made involuntarily. Although mere possibility that a confession was not voluntary is insufficient to warrant its rejection, a high degree of probability would suffice.

62. u/s 3 of the Evidence Act, a "fact" is said to be "proved", when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Thus, the test as to whether a fact stands proved or not is that there is such a high degree of probability that a prudent man would act on the assumption that the fact existed or is true. Section 24, however, dispenses with such a stringent rule and demands a lesser degree of assurance as the criterion for determining voluntariness or otherwise of a confession, be the confession, judicial or extra-judicial. The standard of a prudent man is not completely displaced; but the strict rule of proof is relaxed. In order to, however, reject a confession, as involuntary, a mere opinion of the Court, based on pure surmises, would not be a valid rejection. The Court's opinion that a confession is involuntary may be in the nature of its prima facie opinion based on evidence and circumstances of a given case. What is necessary to bear in mind is that where once existence of unwillingness to confess is established, there is a presumption of its continuance and the prosecution has the onus to prove that the impression, as regards involuntariness caused initially, no longer existed and the involuntariness was replaced by voluntariness and, further, that such voluntariness was not the result of coercion, pressure, threat, inducement, beating or assault. [See Pyare Lal Bhargava Vs. State of Rajasthan,

63. In the light of the above position of law, when we turn to the evidence of PW 1, we note that PW 1 claims that having been informed by PW 7 that Hirendra and Ashidhan (i.e., accused-appellant Nos. 1 and 4 respectively) had taken the said old man, he (PW 1) looked for the said two accused on 29.3.2001 itself, but could not find them and, it was only on the following day, i.e., on 30.3.2001, that Hirendra and Ashidhan were found out. What is, now, interesting to note is that PW 1 has deposed that when Hirendra and Ashidhan were asked about the whereabouts of the old man, they refused to say anything. The evidence of PW 1 further shows, that suspecting that Hirendra and Ashidhan were involved in the disappearance of his (PW 1's) father, Barada, they (i.e., Hirendra and Ashidhan) were brought, by PW 1 and his companions, to the house of PW 1, at Kalacherra,

and it is there, in the words of PW 1, that the said two accused, on "prolonged interrogation", told PW 1 and others that they (Hirendra and Ashidhan), along with others, had caught Barada suspecting him to be a child-lifter, they took him to Kailashnagar Primary School, where accused Hirendra, Ashidhan, Nabin, Manik Tripura, Sadhan Tripura, Annadhan Tripura, Bimal Tripura and Ors. assaulted him throughout the night and, thereafter, both the knees of PW I's father were broken, he was taken inside the jungle, where a big ditch was dug, PW I's father was thrown into the ditch, while he was still alive, and accused Nabin Tripura fired from gun on his (PW I's father chest and head and his (PW I's) father died and was buried there.

64. If the evidence, so given by PW 1, is carefully analysed, it becomes more than transparent that Hirendra and Ashidhan were not willing to part with any information about their alleged role in the disappearance of Barada and, that is why, they had refused to say anything, when they were found, at Lengtabari, by PW 1 and his companions and questioned by them as regards the whereabouts of the said old man.

65. The evidence of PW 1 leaves no room for doubt that the accused-appellant Nos. 1 and 4 were put to "prolonged interrogation" and it was thereafter that they had come out with the confessions, which the two accused-appellants are claimed to have made. Apart from the inconsistency, as regards the fact as to what the said two accused-appellants, Hirendra and Ashidhan, had, actually, confessed to, one cannot ignore the fact that the two accused-appellants aforementioned were not only reluctant, but unwilling to part with any information about Barada's disappearance, far less making voluntary confessions involving themselves in the act of killing of Barada.

66. Let us bear in mind that a confession is made out of repentance and has to be, therefore, voluntary. A statement, extracted by an accused, by putting him under prolonged interrogation, would cease to be confession, for, such a statement was not made by the accused voluntarily, but unwillingly.

67. In the present case, it is abundantly clear that the alleged extra-judicial confessions of the two appellants, Hirendra Tripura and Ashidhan Tripura, were wholly involuntary and, it was for this reason, that they had refused to say anything, when they were, first, questioned by PW 1 at Lengtabari. The two appellants were, thereafter, according to the evidence on record, forcibly, and against their will, brought to the house of PW 1 and, there, on "prolonged interrogation", they are claimed to have been confessions. Once the two appellants aforementioned had indicated their complete unwillingness to part with any information as regards the death or disappearance of Barada Sen Tripura, the learned trial Court had the duty to infer that such unwillingness had continued and it was, in such circumstances, the duty of the prosecution to adduce cogent and convincing evidence on record to show as to what brought the change of heart in the two appellants making them confess to their guilt. This aspect of the prosecution's case appears to have escaped complete

attention of the learned trial Court.

68. We may, at this stage, also refer to the evidence of PW 7, whose clear evidence is that the two accused-appellants, namely, Hirendra and Ashidhan, were assaulted even in the jungle, before the dead body was recovered. According to the evidence of PW 7, both the appellants, namely, Hirendra Tripura and Ashidhan Tripura, were beaten by Balaram (PW 1) and also the police and, then the accused persons were forced to admit their guilt. This piece of unchallenged, unimpeached and unshaken evidence of PW 7 strengthens our inference that the alleged confessional statements, made by the two accused-appellants, were involuntary and cannot be regarded as true inasmuch as we have already pointed out that in the face of the fact that PW 1 and PW 3 have given contradictory evidence as to what the two appellants aforementioned had actually stated, while making their confessions, inasmuch as according to one version, Barada Sen Tripura was already killed at the school and, then, brought to the jungle and buried there, whereas the other version is that Barada Sen Tripura was brought alive to the jungle, shot dead there and, then buried there.

69. Coupled with the above, we have already pointed out that according to the evidence of PW 6, who is a labourer and not shown to be a witness, either favouring the prosecution or the appellants, that before they arrived at the spot, where the dead body was found, some other tribal men had already arrived there and were keeping a watch over the said burial spot meaning thereby the location of the place, as to whether the dead body was lying, had, already become known before the police, allegedly led by accused-appellants Hirendra and Ashidhan, arrived there. How the tribal men had already come to the place, where the said dead body was lying buried, had remained unexplained and cannot be ascertained from the evidence on record.

70. Situated thus, it is difficult to confidently hold, if not impossible to hold, that the statements, attributed to the appellants aforementioned, had actually led the police to the place of recovery of the said dead body. At any rate/the mere fact, that the two appellants, namely, Hirendra and Ashidhan Tripura, knew as to where the said dead body was lying, cannot, in the absence of any other fact, make the Court confidently hold that the said two appellants had killed Barada Sen Tripura, particularly, when we have already held that the confessions alleged to have been made by the two appellants aforementioned can neither be held to be voluntary nor can the same be held to be true. When the evidence as regards extra-judicial confession is kept excluded from the purview of consideration as wholly unsafe to rely upon, the conviction of the accused-appellants cannot be sustained on the basis of the fact that they had allegedly told the police about the place, where the said dead body was lying buried inasmuch as the evidence, adduced in this regard, can, at best, show the knowledge of the two accused-appellants aforementioned as to where the said dead body was lying. This would not in the absence of any other reliable material, make the Court hold that they were the ones, or someone, along with the two accused-appellants

aforementioned, had killed Barada Sen Tripura.

71. In the backdrop of the fact that the alleged extra-judicial confessions, made by the two appellants, namely, Hirendra and Ashidhan Tripura, were involuntary and untrue, when we turn to their judicial confessions, recorded by PW 11, we notice that the said two accused-appellants, according to the evidence on record, were taken to, and handed over, by PWs 1, 2 and 3 and their other co-villagers to the police and, thereafter, the said two accused-appellants were taken into custody by police and were, in course of time, produced, for recording of their confessional statements, before PW 11, whose evidence, as already mentioned above, shows that he did not make any enquiry from the said two accused as to why they had volunteered to make confessional statements nor did he ask the two accused-appellants if they had been tortured in connection with the case during the time of their detention in police custody. Surprisingly enough, PW 11 did not even remember as to how much time had been given to the accused-appellants aforementioned for making reflection on the confessions, which they were to make. There is also no contemporaneous record maintained by PW 11 to show that he had informed the accused-appellants aforementioned that they would not be remanded to police custody even if they chose not to make any confession.

72. What emerges from the above discussion is that the two appellants, namely, Hirendra and Ashidhan Tripura, had not, in the considered view of this Court made the alleged extra-judicial confessions voluntarily and truthfully and PW 11 having failed, contrary to the duty cast on him as a Judicial Magistrate, to do anything to ascertain if the confessions, which the two accused-appellants were seeking to make were voluntary or not and PW 11 having also completely failed to even ensure that the confessions, which the two accused-appellants were to make, be not recorded unless voluntary, the judicial confessions, which PW 11 had recorded, cannot but be treated as wholly unsafe to rely upon as a voluntarily made confessions.

73. In this regard, it is of immense importance to note that it is not the case of the prosecution that based on the statements, given to the police by the two accused-appellants, Hirendra and Ashidhan, the said dead body was recovered; rather, the prosecution's case is that apart from the fact that the said two accused-appellants had expressed their willingness to show the place, where the said dead body lied buried, the said two accused-appellants were, in fact, the ones, who had led police to the place from where the said dead body was recovered. As against this version of the prosecution, the unchallenged evidence of PW 6 speaks loud and clear that the place of burial of the said dead body had stood already identified and was known to others before the police, accompanied by the said two accused-appellants, arrived there. Thus, the place was already known before the accused-appellants arrived there. In such circumstances, the said dead body cannot be said to have been recovered by the police on being led by the two accused-appellants.

74. We may pause here to mention that pointing out to a place, from where an incriminating material is recovered, does not form necessary concomitant of Section 27. A specific question was posed on this aspect of law in State (NCT of Delhi) v. Navjot Sandhu reported in 2005 SCC 1715, and was answered, in the negative, by the Supreme Court in the following words:

...whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the police officer to the place whereon object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible u/s 27. It could very well be that on the basis of information furnished by the accused, the investigating officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact viz. concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it will have no bearing on the point of admissibility u/s 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence.

75. In the present case too, it is not necessary that the two accused-appellants, Hirendra and Ashidhan, ought to have led the police from where the said dead body was recovered. The said place could have been found by the police on the basis of statements of the said two accused-appellants. However, prosecution's case was not that the said place had been found on the basis of the statements of the said two accused-appellants; rather, the prosecution's specific case was that the accused-appellants had led the police to the said place and, on the said place being shown by them, the said dead body was recovered. As against this case, which the prosecution so set up, the evidence on record eloquently speaks, as already discussed, that the said place was already known and was being guarded by some tribal persons before the two accused-appellants aforementioned arrived there.

76. It cannot, therefore, be held that the said dead body was recovered on the basis of the information given by the said two accused-appellants. In this regard, we may also point out that if a statement, whether such statement amounts to confession or not, is involuntarily made to the police by a person, accused of an offence, while he is in custody of the police, such a statement, even if it leads to discovery of a "fact", would not be admissible in evidence. In Navjot Sandhu (supra), the Supreme Court has clearly observed that it is axiomatic that the

information or disclosure should be free from any element of compulsion. In the case at hand, when the unchallenged and unassailed evidence of PW 7 shows that the two accused-appellants, Hirendra and Ashidhan, had been beaten even near the place of recovery by PW 1 and by the police, it must be held that the said accused-appellants' statements, if any, made to the police, were involuntarily made statements. Section 27 of the Evidence Act, therefore, in the facts and circumstances of the present case, does not help the case of the prosecution.

77. What emerges from the above discussion is that the extra-judicial confessions, which the learned trial Court has relied upon, could not have at all been relied upon, the same having been made involuntarily and the same were untrue too. Similarly, the learned trial Court could not have also placed reliance on the judicial confessions since the same were, as already indicated above, involuntary. Even the said dead body cannot be said, in the face of the evidence on record, to have been found and recovered on the basis of the statements made by the two accused-appellants, Hirendra and Ashidhan or being led by the said two accused-appellants. Coupled with all these infirmities, one cannot ignore the fact that the evidence of PW 7 has been contradicted, as already discussed above, by the evidence of PWs 1, 2 and 3 inasmuch as PW 7 claims that the four youths, namely, Hirendra, Ashidhan, Gaticharan, Khungtai and Naradhan, had come to his house and taken away the said old man; whereas the evidence of PWs 1, 2, and 3 shows that among the said four names, PW 7 had disclosed to them the name of only Hirendra Tripura. This apart, PWs 1, 2 and 3 claims that PW 7 had disclosed the name of the accused-appellant, Ashidhan, as the person, who had, along with accused-appellant, Hirendra Tripura, taken away the said old man, but PW 7 does not support these assertions of PWs 1, 2 and 3. Situated thus, neither the evidence of PWs 1, 2 and 3 can be believed nor can be evidence of PW 7 be relied upon. There is, therefore, no sufficient and reliable evidence for the Court to hold confidently that any of the accused-appellants had gone to the house of PW 7 and taken away the said old man.

78. What follows from the above discussion, as a corollary, is that the evidence on record was too inadequate to hold the accused-appellants guilty of the offences of which they stand convicted. The prosecution must be held to have failed to prove that the accused-appellants had committed the offences, which according to the learned trial Court, the accused-appellants have convicted.

79. In the result and for the foregoing reasons, this appeal succeeds. The conviction of, the accused-appellants and the sentences, passed against them, are hereby set aside and they are held not guilty of the offences charged with and are acquitted of the same. Let the accused-appellants be set at liberty forthwith unless they are required to be detained in connection with any other case.

80. Send back the LCR.